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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 361

MASTER METAL STRIP SERVICE, INC. AND MARTIN J. GOSSEN,

Petitioners,

vs.

PROTEX WEATHERSTRIP MFG. CO., A CO-PARTNERSHIP CONSISTING OF JOHN W. MOUSTAKAS, ALIAS JOHN WEST, CATHERINE MOUSTAKAS, AND LOUIS MOUSTAKAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND SUPPORTING BRIEF.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Master Metal Strip Service, Inc. and Martin J. Gossen, respectfully pray for a writ to the United States Court of Appeals for the Seventh Circuit to review the judgment entered by that Court on July 1, 1948.

The transcript of record in the case, including the proceedings in the United States Circuit Court of Appeals, is furnished forthwith in accordance with Rule 38 of the rules of this court.

Note: Unless otherwise noted, emphasis by brief writer.

SUMMARY AND SHORT STATEMENT.

Petitioners, as co-plaintiffs, filed suit against respondent for patent infringement. The complaint (R. 2) as originally filed charged respondent with infringement of all of the claims of Letters Patents No. 2,158,963 (R. 351) and 2,257,051 granted to the petitioner Gossen.

Respondent filed answer (R. 5) to the complaint and concurrently therewith sought declaratory judgment (R. 14) with respect to the Gossen patents 2,158,963 and 2,257,051, as well as a third Gossen patent 2,101,577 not included in the complaint.

Subsequently and before trial, the petitioners amended their complaint to add thereto Paragraph VIII A (R. 44) charging the respondent with contributing to the infringement of claims 1, 2, 3, 5, 6, and 8 of Patent No. 2,158,963, and claims 1, 2, 3, 4, 8, 9, 10, and 11 of Patent No. 2,257,051.

Respondent filed answer (R. 49) denying the charge of contributory infringement and concurrently therewith filed a counterclaim (R. 50) charging petitioners with violation of the Federal Anti-Trust Laws, particularly Title 15, Sec. 1, 2, 3, 4, 15, and 26, U. S. C. A.*

To this counterclaim petitioners filed answer (R. 54) denying the asserted violation of the Anti-Trust Laws.

Thereafter and before trial, petitioners gave notice (R. 59) to respondent that of the claims asserted by petitioners' amended complaint to be infringed, petitioners would at the trial rely solely upon claims 1 and 2 of Gossen patent No. 2,158,963, in suit as the basis of petitioners' charge of infringement sufficient for the cause.

On September 12, 1947, the District Court filed its opin-

* See Appendix.

ion (R. 322) holding claims 1 and 2 invalid for want of invention and adjudging petitioners in violation of the Federal Anti-Trust Laws as charged in respondent's counterclaim and ordering an accounting for damages, if any, suffered by respondent and granting an injunction barring petitioners from maintaining this action (R. 330).

Petitioners appealed to the United States Circuit Court of Appeals for the Seventh Circuit only as to that portion of the judgment (R. 330) with respect to the validity of claims 1 and 2 of Gossen patent 2,158,963 and the charge of violation of the Federal Anti-Trust Laws. That court by its decision (R. 408) dated July 1, 1948, affirmed the judgment of the trial court.* On September 24, 1948, that court denied a petition for rehearing (R. 414).

The Gossen patent No. 2,158,963 (R. 351) relates to a weatherstrip and sash balance. Such weatherstrip and sash balance device by the specification and drawings of the patent is described, and by claims 1 and 2 thereof defined, as comprising a window frame having a sash slidably mounted therein. This sash has frictional and slidable engagement with tubes attached to the frame and projecting into grooves formed in the side rails of the sash. In these tubes are arranged sash balance springs having corresponding end portions attached to the sash and opposite corresponding end portions attached to the tubes whereby the tubes and springs may be assembled together and with the sash prior to the installation of the sash in the frame.

On July 18, 1939, petitioner Gossen granted to the predecessor of the petitioner corporation the exclusive

* The judgment of the trial court (R. 331) dismissed the complaint with respect to claims 3 to 8 inclusive of Patent 2,158,963, and claims 1 to 11 inclusive of Patent 2,257,051, and claims 1 to 8 inclusive of Patent 2,101,577, with prejudice.

"license* and right to manufacture and sell weather-strip and sash balance devices *embodying the invention shown, described and claimed in Licensor's Patent No. 2,158,963 aforesaid and any and all improvements thereon* * * *."

The petitioner corporation and its predecessor have for more than ten years been operating under this license. Such license was introduced in evidence by petitioners at the trial of this cause to establish their joint interest in the patent in suit and their right to join in this suit as co-plaintiffs.

As consideration for such exclusive license the licensee agreed to pay to the petitioner Gossen a royalty. Such royalty by Paragraph 2 of the license was calculated on the number of feet of material sold by the petitioner corporation.

The petitioners in good faith and believing that this license extended to all of the claims of the patent in suit, particularly claims 1 and 2, joined as co-plaintiffs in bringing this suit. In this connection, petitioner Gossen when before the trial court, on direct examination testified (R. 80) that he had granted a license and right to manufacture and sell the subject matter of the patent in suit to Maurice S. Oftedal with the right to extend such license to petitioner corporation and that he recognized the petitioner corporation as the exclusive licensee under the patent in suit.

The defendant offered no evidence that the plaintiffs or either of them had committed any acts in restraint of trade in violation of the Federal Anti-Trust Laws or that defendant or the public was in any way damaged by reason of the patent license in question. Defendant relied solely upon the license, Plaintiffs' Exhibit 8, the contents of which license were brought to the defendant's attention

* See Appendix.

at the time it was introduced in evidence at the trial of this cause for the purpose hereinbefore stated.

The petitioner corporation manufactures and sells a weatherstrip and sash balance spring adapted to be combined in the manner defined by claims 5 and 6 of the Gossen patent 2,158,963 (R. 357) for association with a window frame and sash in the manner set forth in claims 1 and 2 sued upon and as illustrated in petitioners' nationally circulated advertisement (R. 265). Petitioner corporation does not sell either the window frame or sash illustrated in such advertisement and included in the combination of claims 1 and 2.

Claims 5 and 6, above referred to, were put in issue by Paragraph VIII A of the complaint as amended (R. 44) but were subsequently withdrawn from issue by petitioners' bill of particulars (R. 59), thereby leaving in issue only claims 1 and 2. Claims 1 and 5 appear in the Appendix.

The respondent, like petitioners, sells a weatherstrip and sash balance spring related to each other for arrangement in combination with a window frame and sash in the manner illustrated in its nationally circulated advertisement (R. 239-241). Respondent, like petitioners, does not manufacture either the window frame or sash.

The trial court in its opinion said of the petitioners' license (R. 324):

> "Gossen grants to the Master Metal Strip Service Co. (or rather to one Maurice S. Oftedal doing business as the Master Metal Strip Service Co., incorporation not having taken place at that time) the exclusive right to manufacture and sell, not the patented combination, but weather strip and sash balancing devices. As compensation the grantee agreed to pay Gossen one-half cent per foot for the first one million feet of material sold each year by the licensee, no royalty on the second million feet, but on all material over said two million feet, one and a half cent per foot.

"Here Gossen has granted a license, not for the manufacture and sale of his patented combination, but of a single element of that combination, an element that is unpatented and probably unpatentable. How far may he go in granting exclusive licenses to produce the various elements of his patent? May he limit the production of grooved sashes, or coiled springs?

"Under the doctrine announced in the Mercoid cases, I am of the opinion he has attempted to establish an illegal monopoly in the sale of this weather stripping and is therefore barred from maintaining this action."

Thereupon the trial court found by Finding of Fact 7 (R. 326):

"(7) Under the terms of the exclusive license agreement (Plaintiffs' Exhibit No. 8) the plaintiff, Martin J. Gossen, granted to Maurice J. Oftedal, doing business as Master Metal Strip Service Co., the predecessor in business and in interest of the corporate plaintiff, Master Metal Strip Service, Inc., the exclusive right to manufacture and sell, *not the patented combination defined in and by claims 1 and 2 of patent No. 2,158,963, in suit, but the weatherstrip and sash balance devices embodying the inventions shown, described and claimed in this patent* and which constitute a single element of the combination recited in claims 1 and 2 of the Gossen patent No. 2,158,963 in suit, and which is exemplified by plaintiffs' commercial weatherstrip (Plaintiffs' Exhibit No. 13)."

The trial court then concluded (R. 329):

"(6) In and by their license agreement of July 18, 1939 (Plaintiffs' Exhibit 8) and their operations thereunder, and in bringing this action, the plaintiffs have attempted to and have conspired to maintain an illegal monopoly, and have combined in restraint of trade in an unpatented article of commerce, namely a metal weatherstrip-sash balance device, as exemplified by Plaintiffs' Exhibit No. 13, and in so doing the plaintiffs have violated the Anti-Trust Laws of the United States (Title 15, U. S. C. A., Sections 1, 2, 3, 4, 15 and 26)."

In affirming the trial court's judgment with respect to the holding of violation of the Anti-Trust Laws of the United States, the Circuit Court of Appeals said (R. 413):

> "We are of the opinion that the evidence fully supports the District Court's conclusions and judgment as to appellants' violation of the Anti-Trust laws of the United States. We base our conclusions in this respect upon the case of *Mercoid Corporation* v. *Mid-Continent Investment Co.*, 320 U. S. 661. Appellants seek to distinguish that case from the one at bar. We are unable to grasp such distinction."

JURISDICTION.

1. The decision of the Circuit Court of Appeals was rendered July 1, 1948 (R. 408).

2. A petition for rehearing was denied by the Circuit Court of Appeals on September 24, 1948 (R. 414).

3. The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C. Sec. 347) and Sec. 5(b) of Rule 38 of this court.

QUESTION PRESENTED.

The decision of the Circuit Court of Appeals for the Seventh Circuit presents the following question:

Do a patent owner and licensee act against public policy in restraint of trade and in violation of the Federal Anti-Trust Laws by their operations under a patent license which, contrary to their mutual belief and understanding, has been interpreted, in a suit, brought by the patent owner and licensee as co-plaintiffs, for infringement of certain

claims of the patent, as a license which does not extend to all of the claims of the patent, particularly the certain claims sued upon?

REASONS RELIED UPON FOR ALLOWANCE OF THIS PETITION.

The discretionary powers of this court to grant writ of certiorari are invoked under Rule 38 of this court, for the following reasons:

1. The decision of the Court of Appeals for the Seventh Circuit, holding that a patent owner and a licensee by operating under a license which the lower court has interpreted as a license to manufacture and sell devices not embodying the combinations defined by the claims of the patent which were sued upon, but inventions set forth in certain of the other claims of that patent which were not in issue, and by bringing such suit, have attempted to create an illegal monopoly in restraint of trade in an unpatented article of commerce in violation of the Federal Anti-Trust Laws, is a new and extended application of such laws. So far as petitioners can determine, it is the only decision which has so interpreted the Federal Anti-Trust Laws, and has so expanded the principle announced by this court in the *Mercoid* cases (320 U. S. 661, 680) as to include within their restrictive provisions such a license.

2. The Court of Appeals for the Seventh Circuit by its decision has decided an important question of great public interest on the Federal Anti-Trust Laws involving the expansion of the principle announced by this court in the *Mercoid* cases (320 U. S. 661, 680) and other cases. Such question has not been but should be settled by this court. So far as petitioners can determine, neither this nor any

other court has interpreted the Federal Anti-Trust Laws to include within its restrictive provisions a license such as here involved.

3. If the decision of the Circuit Court of Appeals for the Seventh Circuit is allowed to stand without review by this court, confusion and doubt will exist in the minds of patent owners and licensees with respect to whether they are to be subjected to a charge of violation of the Federal Anti-Trust Laws by joining as co-plaintiffs in a patent suit for infringement, should it be developed that the license on which they predicate their joint interests giving them the right to join as co-plaintiffs, is a license which does not extend to all of the claims of the patent, particularly those claims of such patent which were sued upon.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

MASTER METAL STRIP SERVICE, INC., and
MARTIN J. GOSSEN,

Petitioners,

By CLARENCE E. THREEDY,
111 West Washington St.,
Chicago, Illinois,
Their Attorney.

NUNZIO GIAMBALVO,
Of Counsel.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The decision of the Court of Appeals now sought to be reviewed, was entered July 1, 1948 (R. 408).

Jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347) and Sec. 5(b) of Rule 38 of this court.

STATEMENT OF THE CASE.

To avoid repetition, reference is hereby made to the statement on pages 2-7, *supra*, of the Petition for Writ of Certiorari.

SPECIFICATION.

The following is the alleged error of the United States Circuit Court of Appeals which will be urged before this court:

The Circuit Court of Appeals erred in affirming the trial court's judgment to the effect that petitioners in and by their license agreement of July 18, 1939 and their operations thereunder and in bringing their action, have attempted to and have conspired to maintain an illegal monopoly and have combined in restraint of trade in an unpatented article of commerce, namely, an unpatented weatherstrip sash balance device and, in so doing, petitioners have violated the Anti-Trust laws of the United States (Title 15, U. S. C. A., Sec. 1, 2, 3, 4, 15 and 26).

ARGUMENT.

Petitioners by their petition for writ of certiorari do not seek a review by this court of the judgment of the Circuit Court of Appeals with respect to the validity of the claims of the Gossen patent which were sued upon. They seek a review by this court solely of that part of the judgment of the Circuit Court of Appeals holding that petitioners by their license and their operations thereunder and by bringing this suit have attempted to create an illegal monopoly in restraint of trade of an unpatented article of commerce in violation of the Federal Anti-Trust Laws.

Petitioners by their petition for writ of certiorari desire no retrial of the facts but merely seek a proper application of the law to those facts.

The Circuit Court of Appeals by its decision has decided an important question of great public interest on the Federal Anti-Trust Laws involving the expansion of the principle announced by this court in the *Mercoid* cases, 320 U. S. 661, 680.

By its decision, the Circuit Court of Appeals has extended such principle to apply to a license which has been interpreted by the lower court to grant the right to manufacture and sell devices embodying not the combination of the claims of the patent which were sued upon, but rather the inventions defined by other claims of that patent which were not in suit. This notwithstanding petitioners' belief that such license extended to all of the claims of such patent and that they were entitled to join as co-plaintiffs in a suit for infringement of such patent.* This is a new and extended application of the Federal Anti-Trust Laws.

* With respect to this license, the petitioner Gossen, when before the trial court, on direct examination testified (R. 80) that

If the decision of the Circuit Court of Appeals is allowed to stand a state of confusion and uncertainty in the minds of patent owners and licensees will result. They will be confused as to whether they are to be open to a charge of violation of the Federal Anti-Trust Laws, should it develop that, contrary to their belief and their mutual understanding, their license does not extend to the claims of the patent upon which they have elected to sue as co-plaintiffs—or whether they are merely to be held to have no joint interest in such claims such as entitles them to join as co-plaintiffs in a suit for infringement of such claims and therefore necessitating the dismissal of the complaint for lack of interest.

This confusion and uncertainty can only be dissipated by a review by this court of that portion of the judgment of the Court of Appeals with respect to the holding of violation of the Anti-Trust Laws of the United States.

For these reasons, to the patent profession and to all patent owners and licensees the question presented is of great public importance and should be settled by this court.

Furthermore, the question presented by the petition for writ of certiorari is novel. To petitioners' knowledge neither this nor any other court has held that a license which does not extend to all of the claims of a patent runs afoul of the Federal Anti-Trust Laws where it subsequently develops that the question of infringement revolves around those claims of such patent, to which claims the license is found not to extend.

The novel and important question presented is also important to the administration of the Federal Anti-Trust

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he had granted a license and right to manufacture and sell the subject matter of the patent in suit to Maurice S. Oftedal with the right to extend the license to the petitioner corporation and that he recognized the petitioner corporation as the exclusive licensee under the patent in suit.

Laws. It involves, as before pointed out, a new and extended application of those laws.

Upon these premises, this court, notwithstanding the lack of conflict of decisions, should not hesitate to exercise its power of review. *Bacardi Corporation of America* v. *Domenech, Treas. et al.*, 311 U. S. 150; *Sola Electric Company* v. *Jefferson Electric Company*, 317 U. S. 173; *Sheldon* v. *Metro-Goldwyn Pictures Corporation*, 309 U. S. 390; *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608.

PRAYER.

Wherefore, your petitioner prays that its petition be granted; that a writ of certiorari be issued and the case reviewed and the judgment of the Circuit Court of Appeals, in so far as it relates to holding the petitioners guilty of violation of the Federal Anti-Trust Laws, be reversed.

Respectfully submitted,

MASTER METAL STRIP SERVICE, INC. and
MARTIN J. GOSSEN,

Petitioners,

By CLARENCE E. THREEDY,
Their Attorney.

NUNZIO GIAMBALVO,
Of Counsel.

APPENDIX.

Sections 1 and 3 of the Sherman Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C.) read as follows:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal: Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914; Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on con-

viction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The "granting clause" of petitioners' license agreement, Plaintiffs' Exhibit 8 (R. 256), reads as follows:

"1. Licensor hereby grants unto Licensee the license and right to manufacture and sell weather strip and sash balance devices embodying the inventions, shown, described and claimed in Licensor's Patent No. 2,158,963 aforesaid and any and all improvements thereon, said license, subject to the outstanding contract between Licensor and the Sager Weather Strip and Calking Corporation of Chicago, Illinois, to be exclusive to Licensee for the United States of America and the Dominion of Canada, excepting the entire State of Wisconsin in the United States of America, in which latter territory Licensor reserves and retains all rights granted to him by virtue of and under his patent aforesaid, Licensee agreeing not to manufacture the devices of this agreement in said territory or to sell or distribute the same in said territory except by or through Licensor; the license and right herein granted to Licensee to remain in full force and effect during the life of Licensor's Patent No. 2,158,963 and

Patent No. 2,101,577 aforesaid, plus any amendments to or re-issuances thereof, or any improvements thereon, unless sooner terminated by the parties hereto by cancellation in the manner hereinafter provided or by mutual consent or by operation of law or otherwise."

Claim 1 of Patent 2,158,963.

1. In combination,
a window frame (1),
a sash (2) slidably mounted within said frame (1),
tubes (4) secured within the frame (1) at the sides of the sash (2) and each tube (4) having a bottom wall (8) and laterally spaced side walls (7),
the side walls (7) of the tubes (4) being free of the frame (1) and extending into grooves (5) on the adjacent side portions of the sash (2),
said side walls (7) having a spring tension connection with their bottom walls (8) so that the side walls (7) may press laterally against the sash (2) within the grooves (5) to frictionally hold the sash (2) in any position of adjustment within the frame (1),
flange formations (15) along the side walls (7) within the grooves (5),
said flanges (15) extending inwardly from the side walls (7) and terminating short of each other between the side walls (7) to provide slots (14) along the tubes (4) within the grooves (5),
and coiled lifting springs (10) located within the tubes (4) and fixed at one end (13) as to the tubes (4) and connected

at their other ends (17) to the sash (2) through the slots (14) in the tubes (4), said flanges (15) extending over the springs (10) and retaining the same within the tubes (4) in all positions of adjustment of the sash (2) within the frame (1).

Claim 5 of Patent 2,158,963.

5. A combination sash balance and weatherstrip device comprising:

a tubular member 4 constituted of a single piece of spring tension sheet material formed to have a bottom wall 8,

laterally spaced side walls 7,

flange formations 9 and 15 along the inner and outer margins of said side walls 7,

the flange formation 9 along the inner margins of the side walls integrally connecting the side walls 7 to the bottom wall 8 and extending laterally beyond said side walls to provide securing strips 9 along the side of the member 4,

the flange formations 15 along the outer margins of the side walls 7 being integrally connected to said side walls 7 and extending inwardly therefrom and terminating short of each other between said side walls 7 to provide a slot 14 along the member 4 opposite the bottom wall 8,

and a coiled lifting spring 10 located within the tubular member 4 and retained therein by the last-named flanges 15,

said spring 10 being connected at one end 13 to the tubular member and having its other end 17 available for connection with a sash through the slot in the tubular member 4.